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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 424

WALKER WOOD, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, ET AL.,

vs.

STEWART C. BROOM.

MOTION OF THE COMMONWEALTH OF VIRGINIA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

JOHN R. SAUNDERS,
Attorney General,
EDWIN H. GIBSON,
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ALBERT V. BRYAN,
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vs.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it please the Court:

The undersigned, as counsel for the Commonwealth of Virginia, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae.*

JOHN R. SAUNDERS,
Attorney General,
EDWIN H. GIBSON,
COLLINS DENNY, JR.,
Assistants Attorney General,

ALBERT V. BRYAN,
Counsel for Commonwealth of Virginia as Amicus Curiae.

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STEWART C. BROOM.

BRIEF OF AMICUS CURIAE.

PRELIMINARY STATEMENT.

The State of Virginia is interested in the decision of the instant case because of threatened attacks in the Federal courts upon the Reapportionment Act of the 1932 session of the General Assembly of Virginia, by which Act the State of Virginia was divided into nine congressional districts.

A successful attack has been made upon the constitutionality of this Act in the Supreme Court of Appeals

of Virginia upon an allegation that the Act violated both Section 3 of the Act of Congress of August 8, 1911, and Section 55 of the Constitution of Virginia.

Candidates for Congress had been nominated and notices of candidacy had been filed with the Secretary of the Commonwealth of the State of Virginia for election to the Seventy-Third Congress of the United States to represent the districts as provided in the Act of the General Assembly of Virginia. Just before the limit fixed for notification of candidacy for Congress, notices were filed with the Secretary of the Commonwealth by William Moseley Brown and other candidates for Congress as candidates for election as Congressmen-at-large from the State of Virginia, based upon the theory and assumption that the Reapportionment Act of the General Assembly was null and void and that, under the provisions of the Federal law, all Representatives in Congress from the State of Virginia must of consequence be elected at large. Several qualified electors, among whom was the said William Moseley Brown, filed in the Supreme Court of Appeals of Virginia an original petition for a mandamus and injunction, directing and requiring the Secretary of the Commonwealth to certify the names of candidates for Congressmen-at-large and restraining and enjoining him from certifying the names of candidates for Congress from the districts of the State to the electoral boards of the cities and counties, whose duty it is to have printed and distribute to judges of election official ballots for use in the November 8, 1932, election. The Supreme Court of Appeals of Virginia, by its order of the 11th day of October, granted the mandamus and restraining order.

The highest court of our State having passed upon the questions of law involved in the Virginia case, we, there-

fore, desire to be heard in the instant case, the principle of the decision of which must necessarily apply to future Reapportionment Acts of the General Assembly of Virginia, as the decision in the State court indicates that the courts of the respective States will enforce State laws covering apportionment acts.

JURISDICTION OF THE COURTS OF THE UNITED STATES.

We understand that the chief ground upon which counsel for the appellant rely for a reversal of the decision of the lower Federal court is based mainly upon the fact that the amount involved in the litigation is not sufficient to give jurisdiction to the Federal courts. This may be true, although it is not the legal principle of the greatest importance involved in the instant case.

The substantial and material issue is the jurisdiction of the Federal courts in exercising, as is here attempted, a judicial review of State legislation apportioning the representation to which a State is entitled in the House of Representatives of the Congress of the United States. A brief history of Federal apportionment legislation may be of interest.

Until 1842 Congress only provided by law for the number of Representatives to which each State was entitled. In that year an act was passed which provided that States should be divided into districts composed of "contiguous territory."

In 1872 Congress for the first time provided for the creation of districts composed of contiguous territory "containing as nearly as practicable an equal number of

inhabitants." This provision remained in congressional Reapportionment Acts until and including the Act of August 8, 1911. No Apportionment Act was passed following the 1920 census until 1929.

THE ACT OF 1911.

We insist that the Act of 1911 is, by the express provision of its title, limited in effect to the apportionment of Representatives in Congress under the 13th census; that it is not a general law which remains in effect until after it is repealed in whole, or in part, and that the provisions were not operative at the time of the decision of the Mississippi case.

If the Act of August 8, 1911, is in effect, which is denied, we submit that that Act is unconstitutional, as there is no authority vested in Congress by the Constitution of the United States to enact a law regulating the apportionment by Congress of congressional districts. That provision of the Federal Constitution which is supposed to confer power upon Congress is contained in Article 1, Section 4, Paragraph 1, providing:

> "The time, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, but Congress may at any time, by law, make or alter such regulations except as to the places of choosing Senators."

If this section of the Constitution empowers Congress to prescribe the manner of State apportionment acts, it has been egregiously violated by a majority, if not prac-

tically all, of the States of the Union with impunity. Beginning with 1872, practically the same provision as to equality of population in congressional districts has been carried in apportionment acts. The States have consistently and flagrantly violated the principle of equal district population. So far as we have been able to ascertain, no attack has been made upon State statutes enacting apportionment bills following the principle of equal population until within the last year; certainly no case has reached the Supreme Court of the United States in which allegations of constitutional violations have been charged in the matter of this class of State legislation, upon which that court has passed as to that issue.

Such an eminent constitutional lawyer as Daniel Webster is quoted in the majority report of the Committee on Elections in the Fifty-Fifth Congress in the contested election case of Davison, a Republican, vs. Gilbert, a Democrat. The contest in this case contained as its material basis an attack upon the Apportionment Act of the Kentucky Legislature on account of the fact that the State had been gerrymandered in the interests of the Democrats, and that the population of the districts was so unequal that it violated the acts of Congress providing for practically equal district population. Republicans controlled the Congress and the report was favorable to the Democratic incumbent, based principally upon the conclusion of the committee that State apportionment acts were political in character, discretionary with the Legislature and not subject to congressional review, although Congress is itself given full authority to judge of the election, returns and qualifications of its own members. The quotation from Webster contained in the report in that case follows:

> "Whether the subdivision of the representative power within any state, if there be a subdivision, be equal or unequal, or fairly or unfairly made, Congress can not know and has no authority to inquire. It is enough that the state presents her own representation on the floor of Congress in the mode she chooses to present it. If a state were to give to one portion of her territory a representative for every 25,000 persons, and to the rest a representative only for every 50,000, it would be an act of unjust legislation, doubtless, but it would be wholly beyond redress by any power in Congress, because the Constitution has left all this to the state itself."

There are also quotations in the report from Justice Story, Chancellor Kent, and Mr. Madison in the Federalist, in which these writers concede the right of the States to legislate and express the opinion that Congress can only act where the States have failed to do so. We take it that they refer to an entire and complete failure to provide for congressional representation. Gilbert was allowed to retain his seat.

The only time that this court has had an opportunity to pass upon the authority of Congress was in the very recent Minnesota case of *Smiley* v. *Holm*, ..., which reached this court upon an appeal from a decision of the Supreme Court of Minnesota sustaining apportionment legislation by way of resolution after the act had been vetoed by the Governor. In the opinion in the case by Chief Justice Hughes, this court held the apportionment act invalid because of the fact that it had not received the approval of the Governor as a component of the law-making body of that State. The court refused to pass upon the attack made upon the act because of its alleged violation of the Act of 1911, although the Supreme Court of Minnesota

in 238 N. W. 494 had declared that act inoperative because of the subsequent legislation of June 18, 1929. This court in the *Minnesota Case* held the other questions raised as abstract.

CONSTRUCTION OF THE ACT OF 1911.

The effect of a judgment of this court affirming the lower court not only gives effect to Section 3 of the Act of 1911, but affirms the construction placed upon that Act by the lower court.

We insist that the paramount object of that Act was to provide representation by districts and in a case when choice must be made between the election of Congressmen from districts and the election of Congressmen-at-large from a State, courts must apply such a construction of the statute as will give effect to the mandate of Congress providing for the election of Congressmen from the representative districts. This principle of construction is set out at considerable length, and with great force in the opinion of the majority of the court construing the law of Congress by the Supreme Court of Mississippi in *Broom* v. *Wood*, ... Miss. .....

REPEALS BY IMPLICATION.

While we insist that the Act of 1911 is a special act, limited in application to the election of Representatives in Congress from the several States under the 13th census, we further insist that the Act of June 18, 1929, the title of which reads, "An Act to provide for the fifteenth and

subsequent decennial censuses and to provide for apportionment of Representatives in Congress," is of general character, covers the entire field so far as Congress may legally do so, and controls and limits the jurisdiction of Federal courts, if they have any, to the extent they have such jurisdiction, if any, in considering attacks upon legislative apportionment acts passed by the Legislatures of the respective States.

We also insist that, if the Act of 1911 was a general statute and included legislation covering apportionment of Representatives under future censuses, the purposes of Section 3, as well as 4, 5, and 6, have been repealed by implication by the Act of 1929.

Where an act covers the entire field by legislation relating to one subject, prior legislation is thereby repealed by implication.

Murdock v. *City of Memphis*, 20 Wallace 590;
Cook County National Bank v. *United States*, 107 U. S. 445, 451;
Daviess v. *Fairbaron*, 3 Howard, 636;
Butler v. *Russell*, 4 Fed. Cas. 3243;
Tracey v. *Huffly*, 134 U. S. 206, 223, 36 Cyc. 1077, 1080, 1097.

JURISDICTION OF FEDERAL COURTS CONTROLLED BY ACT OF 1929.

Even though Congress has authority to prescribe the manner and method of State apportionment legislation, we submit that there was not when the instant case was decided in the lower Federal court Federal legislative authority providing such method and manner. The Act

of Congress of 1911, in Section 3 thereof, provided in part:

> " * * * the Representatives * * * shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants."

It is under that provision of the statute that the lower Federal court in this case has declared the Mississippi Apportionment Act invalid. The Seventy-First Congress passed Chapter 28 under the title "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for the apportionment of Representatives in Congress." This Act was approved June 18, 1929. U. S. Statutes at Large, Vol. 46, Part 1, p. 21. Title to this Act covers any and all law which was or could have been included in an apportionment regulation.

Included in the original bill, as introduced in Congress and considered in the short session of the Seventieth Congress, was the identical same provision in Section 3 of that bill as is contained in Section 3 of the Act of 1911.

Upon consideration of the bill by the committee of the whole House on the State of the Union on January 10, 1929 (Congressional Record, Vol. 70, Part 11, Seventieth Congress, Second Session, Page 1485), Mr. Lozier, of Missouri (p. 1496 Id.), made the following remarks:

> "Apropos the suggestion of the distinguished gentleman from Pennsylvania (Mr. Graham), I have heretofore called the attention of the House, and the committee that reported the bill, to the provisions of Sections 3, 4 and 5. No man familiar with the Constitution, no man that has even a speaking acquaintance with our organic law, will contend

> for one moment that Sections 3, 4 and 5 have any binding force or effect whatever. The gentleman from Pennsylvania, one of the ablest lawyers in this body, nods his head in approval. Every lawyer, every man that knows anything about the Constitution, knows that these three provisions are violative of the letter and spirit of constitutional mandate. The only power that Congress is given by the Constitution with reference to apportionment of Representatives is to apportion the representation among the several states in proportion to the numbers of population. That duty done, the power of Congress ends, and Congress has no power to determine in what manner the several states exercise their sovereign rights in selecting their Representatives in Congress, and I was glad to hear the gentleman from Pennsylvania (Mr. Graham) indorse what I said on this subject at the last session of Congress on this floor. He says that there is no occasion or need for those provisions. I go further and say that no man who has even a speaking acquaintance with the Constitution will get on this floor and defend the provisions of Sections 3, 4 and 5."

It will thus be seen that Section 3 contained in the original 1929 Act was criticized by Mr. Lozier, of Missouri, and it is apparent from the record that Mr. Graham, of Pennsylvania, acquiesced and agreed with Mr. Lozier in his criticism of that section, and that later on Mr. Dickinson, of Iowa, added to the discussion:

> "Section 3 ought not to be in here, because the states ought to have their own way of making up their apportionment when they know the number of Congressmen they are going to have. (Applause.)"

On the following day and while the bill was still under consideration in its amendatory stage, when Section 3 was reached (C. R. 1604) and the clerk, in the performance of his duty, had read:

> "Section 3. In each state entitled under this Act to more than one Representative, the Representatives to which such state may be entitled in the Seventy-Third and each subsequent Congress shall be elected by districts equal in number to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative. Each such district shall be composed of contiguous and compact territory and contain as nearly as practicable the same number of individuals."

the following appears:

> "Mr. Fenn: 'Mr. Chairman, I move to strike out the section.' The amendment was agreed to."

And in further consideration of the bill, Sections 4, 5 and 6 were stricken therefrom. These sections, while not germane to the principle of equal population contained in Section 3, more clearly indicate the purpose of Congress to absolutely and entirely eliminate Federal laws or regulations of state apportionment legislation. These sections as contained in the bill are quoted:

> "Section 4. In the election of Representatives to the Seventy-Third or any subsequent Congress in any state which under the apportionment provided for in Section 2 of this Act is given an increased number of Representatives, the additional Representative or Representatives apportioned to such

state shall be elected by the state at large, and the other Representatives to which the state is entitled shall be elected as theretofore, until such state is redistricted in the manner provided by the laws thereof, and in accordance with the provisions of Section 3 of this Act.

"Section 5. In the election of Representatives to the Seventy-Third or any subsequent Congress in any state which under the apportionment provided for in Section 2 of this Act is given a decreased number of Representatives, the whole number of Representatives to which such state is entitled shall be elected by the state at large until such state is redistricted in the manner provided by the laws thereof, and in accordance with the provisions of Section 3 of this Act.

"Section 6. Candidates for Representatives at large shall be nominated, unless the state concerned shall provide otherwise, in the same manner in which candidates for governor in that state are nominated."

The foregoing references are to the debates in Congress and the action of the House upon the passage of a reapportionment act, which, after it had passed that body and had been reported favorably by the Senate Committee, failed of passage in the Senate during the short session of the Seventieth Congress.

However, during the first session of the Seventy-First Congress the bill was redrafted in the Senate in the form in which it was passed by both houses of Congress, and was approved June 18, 1929. The members taking a principal part in the consideration of the House Bill, which passed in 1929, but which failed in the Senate,

Mr. Lozier, of Missouri, Mr. Graham, of Pennsylvania, Mr. Dickinson, of Iowa, and Mr. Fenn, were all members of the House of Representatives in the Seventy-First Congress. The same effect, therefore, should be given to the Act of 1929 as covering the whole field of apportionment legislation by Congress as would have been given to the bill which passed the House of Representatives in January of the same year.

DEBATES AND PROCEEDINGS OF CONGRESS.

Objection may be made to the consideration of the facts stated by us as to what took place in the Congress of the United States upon the bill passed by the House of Representatives in January, 1929, and the report of the Senate Committee on that bill.

As a general rule, we agree that, where the language of an act is plain and unambiguous and susceptible of but one construction, it is not appropriate to refer to legislative debates and proceedings. However, debates and reports of committees may be consulted for the purpose of ascertaining the general object of legislation and the evils sought to be remedied. *U. S.* v. *Union Pac. R. Co.*, 91 U. S. 72, 23 L. Ed. 224.

Mr. Justice Brewer, in delivering the opinion of *Holy Trinity Church* v. *U. S.*, 143 U. S. 457, 36 L. Ed. 226, reviewed testimony before congressional committees to determine the purpose of an act on immigration of labor, and cited and quoted from the report of the Senate Committee and said:

> "We find, therefore, that the title of the Act, the evil which was intended to be remedied, the circum-

stances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor."

U. S. v. *St. P. M. & N. R. Ry.*, 247 U. S. 310;
U. S. v. *Freight Assoc.*, 166 U. S. 290;
McLean v. *U. S.*, 226 U. S. 374.

STATE DECISIONS ON AUTHORITY OF COURTS TO REVIEW APPORTIONMENT ACTS.

In *Wise* v. *Bigger, Clerk*, 79 Va. 269, the Supreme Court of Appeals of Virginia, in a case in which the question of equality of population was involved, held even under a state constitutional provision that districts should be of practically equal population, that the General Assembly of Virginia had discretionary legislative authority which was not subject to review by the courts.

In *Richardson* v. *McChesney, Secretary of State*, 128 Ky. 363, a case involving the inequality of population in districts, the Supreme Court of Kentucky held:

> "In the matter of dividing the state into congressional districts the Legislature, at least so far as the power and authority of this court extend, is supreme. This court has no control over this action. It will be exceeding the power granted us to revise and annul a legislative act relating to a subject over which the Legislature has absolute control."

The principles of law here involved were very carefully and thoroughly considered and the court, though

divided in its opinion, held that the action of the Legislature could not be reviewed by a court.

The same finding was arrived at in the Minnesota case of *State* v. *Holm, supra.* The court in the Mississippi case did not undertake to pass upon the question as to whether or not the Act of Congress of 1911 was in effect. The Minnesota case held that it was not, as it had been repealed or superseded by the Act of 1929, but that, even if it was in effect, the court would not annul the apportionment act passed by the Legislature.

In *Moran* v. *Bowley,* 179 N. E. 526, the Supreme Court of Illinois declared the Act of 1911 in effect and decided that courts had jurisdiction to review apportionment acts of the Legislature.

Brown, et al., v. *Peter Saunders, Secretary of the Commonwealth,* overrules *Wise* v. *Bigger, Clerk, supra.*

CONLUSION.

In conclusion we advert to the fact that Acts of Congress from 1872 until 1911 and, we may say, until the passage of the Act of 1929, a period of fifty-seven years, contain provisions requiring representation in the House of Representatives of the Congress of the United States to be by compact and contiguous districts of practically equal population; that until the year 1931 no court, State or Federal, had undertaken to enforce the provisions of law by proper proceedings until after the passage of the Act of 1929, and that during all these years the Legislatures of most of the states of the Union have exercised without restraint and in a manner violative of the provisions of the act what we contend was the legitimate authority of those bodies to apportion their states into

congressional districts free of the exercise of the judiciary to control their actions.

As the State of Virginia is materially interested in the decision in this case, we submit that the judgment of the lower court be reversed and set aside.

Respectfully submitted on behalf of the Commonwealth of Virginia.

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